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No. 38721-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ADVOCATES FOR RESPONSIBLE DEVELOPMENT and JOHN E. DIEHL,

Appellants,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, MASON COUNTY and SHAW FAMILY LLC,

Respondents.

OPENING BRIEF OF APPELLANTS

John E. Diehl pro se
and for Advocates for Responsible Development

679 Pointes Dr. W.
Shelton WA 98584
360-426-3709

pm 5/4/09

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A. Assignments of Error

1. The superior court erred in entering its memorandum opinion of December 3, 2008, and its final order of February 11, 2009 affirming the dismissal of John E. Diehl as a party to the case in the Final Decision and Order of the Western Washington Growth Management Hearings Board ("Board"), dated August 20, 2007 (**751-810**)[1]

2. The superior court erred in letting stand the Board's dismissal of the issue by which Petitioners challenged Mason County ("County") Ordinance 138-06 in exempting new agricultural activities from critical areas regulations pertaining to buffers for fish and wildlife habitat conservation areas by its memorandum opinion of December 3, 2008, and its final order of February 11, 2009.

3. The superior court erred in letting stand the Board's finding compliant a provision in Ordinance 138-06 setting the minimum reasonable residential use as a house of 2,550 square feet (or 40% of the lot area, whichever is less) in regulations pertaining to buffers for fish and wildlife habitat conservation areas

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[1] Because the record before the Board was not assigned page numbers when the superior court clerk, with permission of the Clerk of the Court of Appeals, transmitted the record in digital form, this brief uses the numbers of the Bates-stamped record as prepared by the Board, placing them in bold and omitting the initial three zeros (so that, e.g., "000751" is shown as "**751**"), when referring to the record.

by its memorandum opinion of December 3, 2008, and its final order of February 11, 2009.

4. The superior court erred in entering its memorandum opinion of December 3, 2008, and its final order of February 11, 2009, in which it failed to address expressly the second and third issues identified above.

B. Issues Pertaining to Assignments of Error

1. Given that Diehl appeared before the county on all the issues here under appeal and that the thrust of the Growth Management Act is to encourage public participation, and not to exclude participation on hypertechnical grounds, did the Board erroneously interpret the participant standing requirements of RCW 36.70A.280 in dismissing John E. Diehl as a party? (Assignment of Error 1.)

2. Given that RCW 36.70A.290(3) and .300 require consideration of matters that are subject to petitions for review when these are timely filed within 60 days of legal notice of actions by local government, did the Board erroneously interpret the statutory requirements in dismissing the challenge to the County's regulations pertaining to agricultural activities? (Assignment of Error 2.)

3. Given that the County allowed average sized houses of 2,550 square feet as minimum reasonable uses arbitrarily, without any empirical evidence to warrant such a lenient interpretation of the concept of a "minimum reasonable

use," did the County take an action not supported by evidence that is substantial when viewed in light of the whole record, and did the Board, in finding the County's action compliant, reach a conclusion not supported by evidence that is substantial when viewed in light of the whole record? (Assignment of Error 3.)

4. Given that the County inconsistently conflated an average-sized house with its own restrictions applicable to a minimum reasonable use in critical areas and their buffers, did the Board erroneously interpret RCW 36.70A.060 and .172 and WAC 365-195-920 in finding compliant an amendment to the County's Resource Ordinance that allows construction of an average-sized house as a minimum reasonable residential use? (Assignment of Error 3.)

5. Given that Advocates for Responsible Development ("ARD") indisputably had standing as a party in the proceedings before the superior court, did the court err in failing to address the substance of any issue except the issue of Diehl's standing as a party? (Assignment of Error 4.)

C. Statement of the Case

The Growth Management Act ("GMA") is legislation intended to encourage public participation in the processes by which urban sprawl is reduced, efficient planning is encouraged, critical areas such as fish and wildlife habitat and wetlands are protected, and resource lands are conserved to maintain their productive use. See, e.g., RCW 36.70A.020, .060, .070, .110, .135, and .172.

ARD is a nonprofit unincorporated public interest association dedicated to obtaining implementation of GMA goals and requirements in Mason County (**006**). Founded in 1997, it is a group of volunteers led by its president, John E. Diehl (**848**). On February 20, 2007, Petitioners ARD and Diehl, represented by Diehl, filed a timely petition with the Board for review (**001-145**, including attachments), challenging several County actions taken in late 2006 (notice of which was published in January 2007).

As a volunteer, Diehl has represented ARD in a series of challenges to the County's work (**848**). Though not an attorney, Diehl may represent ARD under RCW 36.70A.270(7), which provides that proceedings before a board shall be conducted in accordance with such administrative rules of practice and procedure as the boards jointly prescribe. The rules of practice and procedure expressly allow practice before a board by a duly authorized representative of a party or participant, without regard to whether the representative is an attorney at law. WAC 242-02-110(1). Moreover, GR 24 provides that practice by a lay representative is **not** unauthorized practice of law, expressly permitting, "whether or not they constitute the practice of law, the following . . . (3) Acting as a lay representative authorized by administrative agencies or tribunals."

However, on a motion from Intervenor Shaw Family LLC (**254-269**), the Board dismissed Diehl as a party in his individual capacity (**288-294**), because

the Board held that he had failed to establish participant standing, even though he had submitted written comments to the County at the time the proposed ordinances were being considered, writing that he was submitting comments in behalf of ARD (**216**).[2]

A second issue in this case stems from the County's adoption in December 2006 of an amendment to its Resource Ordinance exempting agricultural activities from critical area regulations. Petitioners challenged the exemption on the basis that agricultural activities may do serious harm to stream buffers intended to protect Fish and Wildlife Habitat Conservation Areas, and that regulation is needed to mitigate their potential harm (**002** and **005**). The Board did not reach the merits of this issue, but dismissed it upon a motion by the County, which had argued that SSB 5248, made effective May 1, 2007, and codified as RCW 36.70A.560 and .5601, prevented the County, if it were found

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[2] Although this dismissal had negligible immediate effect, since Diehl continued to represent ARD under the boards' rules of practice and procedure, the ruling threatened the ability of ARD and its members to have their position heard on appeal. In the case stemming from the Shaw Family LLC's appeal of the same decision by the Board, the court declined to consolidate that appeal with the present appeal, and so set the stage for a motion by counsel for the Shaw Family to preclude Diehl from representing ARD. Notwithstanding GR 24, this motion was granted, and Diehl's motion to be allowed either to represent himself as a member of ARD or to intervene was denied. Since ARD lacked funds needed to hire an attorney to represent it, and since no pro bono attorney was available, the members of ARD not only were unrepresented in the Shaw Family LLC appeal, but also may be liable individually (because ARD is an unincorporated association) for court costs if the Shaw Family LLC prevails.

noncompliant, from repairing defects in its work until after the moratorium set by SSB 5248 expired July 1, 2010 (**205** and **790**).

Regarding a third matter, the Board found compliant a provision of the County's ordinance setting the minimum reasonable use as a house of "average" size, viz., 2,550 square feet or 40% of the lot size, whichever is less, in areas zoned residential(**791**).

On several other issues, the Board agreed with Petitioners, including the challenge to the amended Future Land Use Map, where the Board's conclusion has been challenged in a separate action by the intervenor, Shaw Family LLC (Court of Appeals Case No. 38671-2-II; Mason County Case No. 07-2-00860).

The three issues ARD and Diehl brought for judicial review were chosen, not simply because Petitioners disagreed with the conclusions on these issues by the Board, but because each of these conclusions rests on an interpretation of law where there is no material disagreement of fact and where Petitioners believe the Board erred.

The petition for judicial review was timely filed October 10, 2007. In its memorandum opinion of December 3, 2008, the superior court devoted only two short paragraphs to this petition, expressly resolving only one of the issues brought for review by ARD and Diehl. CP at 51. Without stating any reason, the Court then said it was "satisfied" that the Board's decision to dismiss Diehl as a

party on the basis of lack of standing was correct. Id. The court issued no express determination regarding the issues of whether the Board had misinterpreted the law in dismissing the challenge to the County's exemption for agricultural activities and whether the Board had misinterpreted the law and had failed to support its order with substantial evidence when it allowed average sized houses to be treated as "minimum reasonable uses" in the County's critical areas ordinance, though by implication it let stand the Board's rulings on these issues.

D. Argument

1. The interpretation of law on review is de novo.

The standard of review for adjudicative actions taken by an agency is set forth in RCW 34.05.570(3). Under this statute the grounds for reversal of an agency decision include:

> (d) The agency has erroneously interpreted or applied the law; [or]
>
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter.
> . . .

It is these grounds for reversal, and primarily the first of these, on which this appeal rests. In reviewing issues of law under RCW 34.05.570(3)(d), judicial review is de novo. *City of Redmond v. Cent. Puget Sound Growth Mgmt.*

Hearings Bd., 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

"[S]ubstantial evidence is 'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.' " *Id.* (quoting *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510, *review denied*, 132 Wn.2d 1004, 939 P.2d 215 (1997)). On mixed questions of law and fact, appellate courts determine the law independently, then apply it to the facts as found by the agency. *Hamel v. Employment Sec. Dep't*, 93 Wn. App. 140, 145, 966 P.2d 1282 (1998), *review denied*, 137 Wn.2d 1036, 980 P.2d 1283 (1999).

2. The Board erred in dismissing Diehl as a party to the case.

To establish standing before the Board, Petitioners invoked RCW 36.70A.280(2)(b), which grants standing to "a person who has participated orally or in writing before the county or city regarding the matter on which review is being requested." Under Section .280(3) "person" applies to, among others, individuals, associations, and private organizations or entities of any character. Under RCW 36.70A.280(2)(b) appearance standing is obtained by the writing of a nonspecific letter to the local government during the GMA legislative process. *JCHA v. Port Townsend*, No. 96-2-0029, Order of November 27, 1996. The statute sets no specific requirements on the nature of the oral or written participation.

The Board held that Petitioner Diehl lacked standing because, though it was conceded that he submitted two letters for County hearings pertaining to the matters for which he and ARD later sought Board review, he did not add that he was also writing in behalf of himself when he said he was writing to comment "in behalf of Advocates for Responsible Development" (**214** and **216**).

The Board offered no authority in support of its view that Diehl needed to state specifically that he was speaking for himself as well as ARD in order to claim participatory standing. The Board said, "Since he expressly did not participate in his individual capacity, he does not have participation standing in his individual capacity." (**290**). But it is false that Diehl expressly did not participate in his individual capacity. In expressly participating on behalf of ARD, he did not disclaim, expressly or by implication, participation in his individual capacity. It is a non sequitur to infer, as the Board did, that if an individual does not **expressly** participate in an individual capacity, that he expressly does not participate in an individual capacity.

By participating in writing before the County on the matter for which review was sought, Diehl fulfilled all requirements within the plain meaning of the statute.

> Where the meaning of statutory language is plain on its face, we must give effect to that plain meaning as an expression of legislative intent. . . . In discerning the plain meaning of a provision, we consider the entire statute in which the provision

> is found, as well as related statutes or other provisions in the same act that disclose legislative intent. *[citations omitted].*

City of Spokane v. Spokane County, 158 Wn. 2d. 661, 673 (2006)

The statute does not limit participatory standing to persons who say they are speaking or writing on behalf of themselves or exclude individual standing to persons who say they are writing on behalf of a group and who do not add that they are also writing for themselves. The legislature has the sole authority to impose conditions for standing to file a petition for review. The GMA does not grant authority to hearings boards to engraft a more rigorous standing requirement than that which is set forth in the language of the statute, as the Board itself has acknowledged in other circumstances. See *ICCGMC v. Island County*, WWGMHB Case No. 98-2-0023, Order of March 1, 1999.

Decisions by the other growth management hearings boards do not support the Board's conclusion in this matter. The Central Puget Sound Growth Management Hearings Board has held that "the question of standing is to be interpreted liberally . . . ." *Sky Valley v. Snohomish County* ("*Sky Valley*"), CPSGMHB Case No. 95-3-0068c, Final Decision and Order of March 12, 1996, at 24. The Eastern Washington Growth Management Hearings Board, in granting standing to a petitioner, stated that "[t]he Board recognizes the spirit of the GMA is to encourage citizens to participate, not limit participation through a technical interpretation of standing requirements." *Concerned Friends of Ferry*

County and David Robinson v. Ferry County, EWGMHB Case No. 01-01-0019, Amended Motion Order of April 16, 2002.

Although the statutory definition of "person" clearly permits an **organization** to attain participation standing, the question of what is required for an organization to attain participation standing ultimately required clarification by the boards. The first hearings board case to address this issue was *Friends of the Law v. King County* ("*Friends*"), CPSGMHB Case No. 94-3-0003. The Central Puget Sound board held that "for an organization to have participation standing, a member of that organization must identify himself or herself as a representative of the organization when that person testifies at a hearing or submits a letter to the county or city." *Friends*, Order on Dispositive Motions of April 22, 1994, at 9. The board imposed this requirement to "give notice to the local government that the people before it represent more than individual interests, that they are part of a group." *Sky Valley*, Final Decision and Order, at 21.

The question of whether an **individual** who as a volunteer has represented an organization attains participatory standing as an individual under RCW 36.70A.280(2)(b) is one of first impression in the courts of Washington. However, this issue has been addressed by the Central Puget Sound Growth Management Hearing Board . In *Friends*, a citizens group called "Friends of the

Law" ("FOL"), sought to establish its participation standing on the basis of participation by individual members of the group. Two members had participated in hearings before the County. One of those members, Ms. Kastning, had signed into the hearings without indicating that she did so as a representative of any group. The second member, Ms. Klacsan, had signed into the hearings as a representative of another group, Snoqualmie River Valley Alliance ("SRVA"). Because the board held that identification of the organization being represented at the time it was being represented was essential to establish participation standing for the organization, FOL was found to lack participation standing in this case. The Board went on to state, in dicta, that while FOL lacked participation standing, "[i]n Ms. Klacsan's case, since she signed in as representing the [SRVA], she would have conferred standing upon the SRVA . . . Furthermore, **both Ms. Klacsan and Ms. Kastning would have standing to appear before the board as individuals.**" Emphasis added.

Diehl's position in this case is similar to the position in which Klacsan found herself in *Friends*. Diehl has participated before the County, by writing and signing two letters. Just as Klacsan signed into the hearing as a representative of SRVA, Diehl signed these letters "in behalf of" ARD. Therefore, just as the Central Puget Sound Growth Management Hearings Board held that Klacsan would have had individual standing in *Friends of the Law*, it would hold that

Diehl's participation before Mason County granted him standing as an individual in the subsequent case before the Board.

Such a conclusion would be consistent with both the broad policies of the Growth Management Act favoring public participation – see RCW 36.70A.020(11), .035, .130, and .140 – and the specific requirements for standing in the statutes and the boards' rules of practice and procedure. Standing does not require, for example, "injury-in-fact" (the test for standing in cases brought under the Land Use Petition Act, RCW 36.70C), but only participation "orally or in writing before the county or city regarding the matter on which a review is being requested." RCW 36.70A.280(2)(b). And, as previously discussed, the rules allow lay representatives for groups. WAC 242-02-110(2). While it may be important for an organization to give express notice that certain persons are representing it collectively, since an organization cannot literally participate, no such rationale applies to individuals. When an individual participates before local government, the individual does not have to inform the government that he or she is participating on his or her own behalf in order for the government to be aware of the individual's interest. If an individual appears, it follows that the individual has an interest.

In effect, the Board has adopted a rule that would require an individual appearing as a representative of an organization not only to say that he or she is

representing the organization, but also to add that he or she is representing himself or herself, or else be stripped of individual participation standing. Such an arcane, hyper-technical interpretation of participation standing would be inconsistent with the express statutory language, contrary to GMA goals and requirements encouraging public and relatively informal participation, and out of step with decisions by the Central Puget Sound and Eastern Washington Growth Management Hearings Boards. Therefore, the requirement imposed by the Board in this case should be found to be an erroneous interpretation of law.

3. The Board erred in dismissing the issue relating to exemption of agricultural activities from critical area regulations.

GMA requires any challenge to local government actions to be filed within 60 days after publication of notice of the action. RCW 36.70A.290(2). Growth management hearings boards must hear and decide such petitions, unless found frivolous, within 180 days of the date of filing. RCW 36.70A.290(3) and .300(2). Petitioners in this case timely filed their petition, which included a challenge to an amendment to the County's Resource Ordinance:

> By exempting new agricultural activities within Fish and Wildlife Habitat Conservation Areas or their buffers providing they comply with a conservation plan, does §17.01.110.F.3 fail to protect such critical areas as required by RCW 36.70A.060(2) and .172(1) and/or WAC 365-195-920 and interfere substantially with the goals of conserving fish and wildlife habitat and protecting the environment (RCW 36.70A.020(9) and (10))?

(**005**). Although no one has claimed that the challenge was untimely or frivolous,

the Board declined to hear and decide the issue within the 180 days specified by the statute, dismissing the issue "without prejudice"(**790**).

The Board erred in supposing that SSB 5248, which created a moratorium on new regulations of agricultural activities as they impact critical areas, somehow restricted the Board's statutory mandate to hear and decide this matter within 180 days of the filing date. To the contrary, the legislation was not intended to relax GMA requirements for protection of critical areas or to diminish the jurisdiction of the growth management hearings boards during the moratorium. In fact, the legislature expressed the intent **not** to diminish existing critical area ordinances that apply to agricultural activities during the deferral period established in RCW 36.70A.560:

> **Finding -- Intent -- 2007 c 353:** . . .(4) The legislature does not intend this act to reduce or otherwise diminish existing critical area ordinances that apply to agricultural activities during the deferral period established in RCW 36.70A.560." [2007 c 353 § 1.]

Although the Board dismissed the issue "without prejudice,"apparently intending that Petitioners, if still alive and active, might renew their petition on this issue "after the delay established in SSB 5248 has expired" (**589-590**), it ignored the fact that SSB 5248, codified as RCW 36.70A.560 and .5601, did not repeal, nullify, or supersede either the GMA provision requiring any challenge to local government actions to be filed within 60 days after publication of notice of

the action (RCW 36.70A.290(2)) or the provision requiring a growth management hearings board to hear and decide such petitions, unless found frivolous, within 180 days of the date of filing (RCW 35.70A.290(3) and .300(2)).

SSB 5248 did not prohibit the relief sought by Petitioners -- a finding of noncompliance and a determination of invalidity regarding the modification made to the County's Resource Ordinance. The statute did not restrict hearings boards from concluding that a county's regulations pertaining to allowable agricultural activities within critical areas are noncompliant and invalid. It simply prohibits amendments to existing ordinances during the specified moratorium:

> 1) For the period beginning May 1, 2007, and concluding July 1, 2010, counties and cities may not amend or adopt critical area ordinances under RCW 36.70A.060(2) as they specifically apply to agricultural activities. Nothing in this section:
>
> (a) Nullifies critical area ordinances adopted by a county or city prior to May 1, 2007, to comply with RCW 36.70A.060(2);
>
> (b) Limits or otherwise modifies the obligations of a county or city to comply with the requirements of this chapter pertaining to critical areas not associated with agricultural activities; or
>
> (c) Limits the ability of a county or city to adopt or employ voluntary measures or programs to protect or enhance critical areas associated with agricultural activities.
>
> (2) Counties and cities subject to deferral requirements under subsection (1) of this section:
>
> (a) Should implement voluntary programs to enhance public

> resources and the viability of agriculture. Voluntary programs implemented under this subsection (2)(a) must include measures to evaluate the successes of these programs; and
>
> (b) Must review and, if necessary, revise critical area ordinances as they specifically apply to agricultural activities to comply with the requirements of this chapter by December 1, 2011.

RCW 36.70A.560. Under the statute, if the Board had concluded that the County's regulations were not compliant, then the existing regulations would remain in effect, though the County would be on notice that it needed to plan to remedy its noncompliance when the commission established by the legislation had finished its work, and would be encouraged in the meantime to implement voluntary programs pursuant to RCW 36.70A.560(2)(a). Given that the County had previously taken much more than three years to bring itself into compliance in two prior cases,[3] it would have been helpful to give the County notice as soon as possible of its noncompliance, even if SSB 5248 did not allow the challenged regulation to be entirely repaired until 2010. If the Board had reached a determination of invalidity, then, as provided in RCW 36.70A.302, a development permit would not be vested under state or local law until the County made a repair determined by the Board not to substantially interfere with the fulfillment of GMA goals. While this would mean that development permits

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[3] In Case No. 95-2-0073, filed in 1995, the County did not achieve compliance until 2003. In Case No. 96-2-0023, filed in 1996, compliance was not attained for seven years.

would not vest where agricultural activities are involved, agricultural activities are not ordinarily subject to development permits, and so the inconvenience of a determination of invalidity would be relatively insignificant.

The absurd consequence of the Board's ruling appears to be, not only that the issue could not be heard until after the moratorium of SSB 5248 expired, but that it could not be heard at all, given that to bring the issue again would require a new petition to the Board, and given that any such new petition would be untimely under the requirement that challenges to local government actions be filed within 60 days of the local government action. RCW 36.70A.290(2). The Board has ignored the plain meaning of the statutory requirement to hear and decide matters within 180 days of the filing of a valid petition, and has also ignored the 60-day restriction that would disallow a refiling of the petition after the SSB 5248 moratorium expires. The Board's conclusion improperly engrafts a restriction on GMA petitions not to be found in law and denied Petitioners their opportunity and right to a timely challenge to the action of the County.

4. The Board's ruling that allows an average-sized house to be deemed the minimum reasonable residential use is not supported by evidence that is substantial when viewed in light of the whole record.

An amendment to the County's Resource Ordinance, §17.01.150, set the mean average size of house for which a building permit was obtained in Mason County in the period 2002-2005, apparently 2,550 square feet, as the "minimum

reasonable residential use," provided that the parcel on which the house is to be sited is such that the house does not exceed 40% of the area of the lot (**141**). The amended section's stated purpose is "to allow the County to consider requests to vary or adapt certain numerical standards of this Chapter where the strict application of said standards would **deprive property owners of reasonable use of their property**." §17.01.150.A; emphasis added. The section applies to setback and buffer/vegetation area requirements within designated critical areas and resource lands; except wetland related setbacks. §17.01.150.B. The amendment applies to the variance criteria found in MCC §15.09.057, which include:

> 1. That the strict application of the bulk, dimensional or performance standards precludes or significantly interferes with a reasonable use of the property not otherwise prohibited by County regulations; . . .
> 4. That the variance authorized does not constitute a grant of special privilege not enjoyed by the other properties in the area, and **will be the minimum necessary to afford relief**; . . . [and]
> 6. No variance shall be granted unless the owner otherwise lacks a reasonable use of the land. Such variance shall be consistent with the Mason County Comprehensive Plan, Development Regulations, Resource Ordinance and other county ordinances, and with the Growth Management Act. Mere loss in value only shall not justify a variance.

Emphasis added.

As Issue 14, Petitioners asked the Board to determine that the County had arbitrarily set the minimum reasonable use for a residence in a residentially

zoned area, and so had failed to protect critical areas as required by RCW 36.70A.060(2) and .172(1) and/or WAC 365-195-920 (**005**).

In essence, RCW 36.70A.060(2) requires counties to adopt development regulations to protect designated critical areas, which by definition include fish and wildlife habitat conservation areas. RCW 36.70A.030(5). What comprises protection is to be determined by inclusion of "the best available science." RCW 36.70A.172(1). WAC 365-195-920 provides that if there is inadequate scientific information, "leading to uncertainty about which development and land uses could lead to harm of critical areas or uncertainty about the risk to critical area function of permitting development," then either a "precautionary or a no risk approach" or an interim, "effective adaptive management program" should be used.

Clearly, development regulations are not to be set by fiat, without any supporting evidence. If scientific evidence is inadequate, then the mandate is either to adopt a precautionary, no risk approach or to use an adaptive management procedure, by which, with "funding for the research component," a county will purposefully monitor and evaluate whether its regulations "are effective and, if not, how they should be improved to increase their effectiveness." WAC 365-195-920(2).

The County did not claim that it had adequate scientific evidence to show

that allowing the average-sized house to be considered the minimum reasonable use would be consistent with the mandates of RCW 36.70A.060(2) and .172(1). It did not claim that, lacking adequate scientific evidence, it had used either a precautionary, no risk approach or an adaptive management approach pursuant to WAC 365-195-920. Instead, it argued that its specified minimum reasonable use was not erroneous because a staff report explained that the size of house deemed a minimum reasonable use was based on the mean average size of houses for which permits were sought in the period from 2002 to 2005 (**557**).

Such a rationale is not founded on the statutory requirements for protection with inclusion of best available science or the alternative approaches allowed under WAC 365-195-920 where scientific information is inadequate. Thus, the Board, in concluding that the County ordinance was in compliance with GMA requirement, failed to base its ruling on substantial evidence.

5. The Board erroneously interpreted the law when it allowed an average-sized house to be deemed the minimum reasonable residential use.

The Board failed to recognize that the County's regulations pertaining to minimum reasonable use were internally inconsistent, and therefore contrary to the requirement of RCW 36.70A.040(4) (applicable to the County) that the County must "adopt a comprehensive plan and development regulations that are consistent with and implement the comprehensive plan . . . ." The County created the inconsistency by defining a minimum reasonable use as an average use. The

Board then also failed to ensure that regulations adopted pursuant to RCW 36.70A.060 and .172, designed to protect critical areas through inclusion of best available science, were not undermined by exceptions that unreasonably limited the application of the regulations.

Who has ever seriously supposed that the average size of anything is the minimum that is reasonable? [4] This makes a mockery of the concept of a **minimum** reasonable use **minimizing** the adverse effects of construction in places supposed to be protected against the adverse effects of housing development on nearby fish and wildlife habitat. Logically, the minimum reasonable use, or, in the words of the criterion, "the minimum necessary to afford relief, . . [provided] the owner otherwise lacks a reasonable use of the land," cannot be the average use. The absurd logical consequence of equating the two is to make every application for a building permit of less than average size an unreasonable use, even though it is obvious that many applicants will voluntarily and reasonably choose to build a less than average size house.

The County's standard of "minimum reasonable use" means that a

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[4] The County appears confused about what average it employed, for staff member Fink speaks of "the average size in the sense that 50% of the houses are bigger and 50% of houses are smaller" (**559**). But this is a definition of the median average, not the mean average. Neither mean nor median makes sense as a minimum reasonable use, though the median would be a little better, since the mean may be skewed by a few high square footage "McMansions."

developer possessing a 5,000-square-foot shoreline lot is entitled to erect a 2,000-square-foot house, and that the owner of a 6,000-square-foot lot is entitled to build a 2,400-square-foot house. Plainly, owners of such small lots would still have reasonable use of their land if they were somewhat more restricted in the size of house they might build.

The Board apparently failed to recognize that any "reasonable use exception" to critical area regulations is in some measure adverse to what the regulations are designed to accomplish, and that any use so allowed creates, by definition, a nonconforming use, or, more exactly, a use that would be a nonconforming use if it already existed. In general, such uses are disfavored in law because they obviously work against achieving the purposes for which a law or regulation was adopted. Commentators agree that nonconforming uses limit the effectiveness of land-use-controls, imperil the success of community plans, and injure property values. See 1 R. Anderson, American Law of Zoning § 6.02; R. Settle, Washington Land Use § 2.7(d); Daniel R. Mandelker, "Prolonging the Nonconforming Use: Judicial Restriction of the Power to Zone in Iowa," 8 DRAKE L. REV. 23 (1958); C. McKim Norton, "Elimination of Incompatible Uses and Structures," 20 Law & Contemp. Probs. 305 (1955); and James A. Young, "The Regulation and Removal of Nonconforming Uses," 12 W. RESERVE L. REV. 681 (1961), cited in *Rhod-a-zalea v. Snohomish County*,

136 Wn.2d 1 (1998) at 8.

The reason for specifying the **minimum** reasonable use is to **minimize** the adverse effect of such development, not simply to allow, willy-nilly, "average" uses. The County lost sight of the original rationale for restricting development in critical areas and their buffers. The County's action was clearly inconsistent with the very concept of "the minimum necessary to afford relief; . . [provided] the owner otherwise lacks a reasonable use of the land." It failed to recognize that, by definition, setback and buffer/vegetation area requirements within designated critical areas and resource lands are intended to protect such areas, and that permitting average-sized dwellings in such areas is contrary to the scientific basis for the setback and buffer/vegetation area requirements. Consequently, this provision nullifies part of the regulatory protection mandated by RCW 36.70A.060, and by neglecting to employ any scientific rationale for the size of the minimum reasonable use also violates the requirement of RCW 36.70A.172(1) that calls for using best available science to devise regulations to protect critical areas. As such, the Board's conclusion is an erroneous interpretation of law.

6. The superior court erred in failing to address any issue except Diehl's standing.

In its memorandum opinion, the superior court said "In light of this Court's determination above [referring to issues in the Shaw Family LLC appeal

of the same hearings board decision], the only issue this court believes necessary to resolve is the issue raised regarding standing of John Diehl." CP at 51. Thus, of the three issues brought by ARD and Diehl, only one was expressly decided by the superior court.

Since the Shaw appeal did not in any way address the issues of the exemption for agricultural activities and the County's arbitrary treatment of average-sized houses as minimum reasonable uses in critical areas and their buffers, it is hard to imagine how the court inferred that its determination regarding the Shaw appeal resolved these issues brought by ARD and Diehl. Possibly, though it did not expressly say so, the court believed that by affirming the Board's ruling that Diehl lacked standing, it need not address the other issues ARD and he appealed. But ARD, indisputably a party with standing, had requested review of these issues the court neglected. Given that the issues raised in the Shaw appeal, to try to sustain the County's action in amending its Future Land Use Map to accommodate the desire of the Shaws to subdivide their land, did not touch the issues brought for review by ARD and Diehl, even if Diehl were found to lack standing, the issues were before the court by reason of ARD's standing, and ought to have been addressed by the court.

E. Conclusion

Petitioners ask that the court determine that the Board erroneously

interpreted or applied the law and that it reached legal conclusions here appealed that are not supported by evidence that is substantial when viewed in light of the whole record before the court. Petitioners also ask the court to remand to the Board for modification of its rulings consistent with the court's determinations. In the alternative, Petitioners ask that the case be remanded to the superior court for a full consideration of the issues brought by ARD and Diehl.

Dated: May 1, 2009 Submitted by: John E. Diehl

John E. Diehl pro se
and for Petitioner ARD pro se
679 Pointes Dr. W.
Shelton WA 98584
360-426-3709

Declaration of Service

I declare under penalty of perjury under the laws of the State of Washington that on the date indicated below I served by U.S. mail, postage prepaid, and/or fax the above Opening Brief on Monty Cobb, Deputy Prosecuting Attorney for Mason County, at P.O. Box 639, Shelton WA 98584; Stephen T. Whitehouse, attorney for Shaw Family LLC, at 601 W. Railroad Ave., Suite 300, Shelton WA 98584; and Martha Lantz, Attorney General's Office, P.O. Box 40110, Olympia 98504-0110

Dated: May 1, 2009

John E. Diehl